

No more privileges

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On 14 March 2001, a motorcyclist was stopped at a road junction in Liverpool, waiting to turn. A car drove into him. The driver of the car was drunk, uninsured and was driving whilst disqualified. Apart from physical injuries, the motorcyclist suffered post traumatic stress disorder, with resultant chronic pain.

He instructed solicitors soon after the accident and they in turn appointed a clinical psychologist who prepared a report broadly supporting the claim, which was made against the Motor Insurance Bureau.

The defendant of course appointed another clinical psychologist, who concluded that the motorcyclist was exaggerating the symptoms. The judge ordered the two experts to prepare a joint statement.

The joint report was not what the motorcyclist's solicitors were expecting. In it, his expert agreed with the defendant's expert that he had not suffered post traumatic stress disorder at all and that he had been deceitful in describing his symptoms. The solicitors expressed their surprise, and the expert admitted that she had not seen the other side's report at the time of the conference, which was on the telephone. She said that the joint report did not really set out her views and she said that she was happy that it should be changed.

The solicitors asked the court if they could change expert, but permission was not given, and faced with an unsatisfactory joint report, the claim was settled for rather less than had been expected.

The motorcyclist then sued the expert for negligence. The claim failed, because the judge was obliged to follow an earlier Court of Appeal decision that an expert was entitled to immunity from claims for negligence in the course of litigation. Leave was given however for appeal to the Supreme Court (formerly known as the House of Lords).

Expert witnesses have been given the privilege of immunity to make sure that they do not feel constrained to support their clients through thick and thin despite having doubts about the strength of the case. It is a tradition that dates back over 400 years, and it is one that two dissenting judges in the Supreme Court felt should continue.

But the majority of the Supreme Court judges decided that it was time for change. Their underlying philosophy was that every wrong should have a remedy, and any exception to that rule should be justified as being in the public interest. Immunity was not necessary to ensure that expert witnesses were honest in court. If the expert used his reasonable skill and care in giving advice to his client and then changed his mind when the full facts and opinion of other experts were available, there was no breach of duty. If the expert had been negligent in giving advice in the first place, there was no reason why a claim should not be made.

The lead judgment was given by Lord Phillips, but it was enthusiastically supported by Lord Dyson, who came across an expert or two when he was presiding judge in the Technology and Construction Court.

There has been an explosion of blog comment on this in the days since the judgment on 30 March. Some think that there will be a revival of the "hired gun" style of expert witness, determined to fight vigorously for the client regardless of the true technical position. There are still some of them around, but they have become rarer in the construction courts as

judges have been increasingly robust in criticising such behaviour. After all, it is not good for your practice to have comment in the law reports that you are unreliable. This is likely to remain an effective disincentive to the over eager expert.

Others think that there will be an explosion of litigation with virtually every unsuccessful litigant blaming the expert and having a go to recover outlay on costs and damages. This also seems unlikely. It didn't happen when barristers lost their similar immunity. On the other hand it may mean that expert witnesses take real care to avoid the sort of mistake that seems to have been made by the expert in this motor accident case. If this decision encourages experts to read what they are signing and only agree things that they really agree, the whole court process will benefit. That is particularly true in the Technology and Construction Court where so many cases hinge on expert opinion.

One effect will be interesting to monitor. Will insurance premiums go up? They shouldn't, but they probably will.